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No. 82-695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

v.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF APPELLEES

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BRIEF AMICUS CURIAE OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

The ERISA Industry Committee submits this brief with the written consent of the parties pursuant to Supreme Court Rule No. 36.2.

The ERISA Industry Committee (ERIC) is a nonprofit corporation whose members constitute an association of more than 100 major companies, all of whom maintain benefit plans for their employees. ERIC members represent a wide cross section of American business; the benefit plans of these members are numerous and varied, and, in all, cover millions of participants. Through ERIC, member companies coordinate their views and provide practical information and recommendations

to government on how the private benefit plan system functions and the impact on plan sponsors and participants of government regulations and interpretations under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

In the instant case, the California Franchise Tax Board, invoking the state revenue law,[1] served notices directing the trustees of an ERISA-regulated employee benefit plan, the Construction Laborers Vacation Trust, to withhold and transmit to the Board funds due certain participants in the plan. The Board contended that these participants had failed to satisfy their state income tax liabilities. The trustees refused to comply with the Board's notices, relying on an advisory opinion issued by the Administrator, Pension and Welfare Benefit Programs, U.S. Department of Labor, which concluded "that the process of any state judicial or administrative agency seeking to levy for unpaid taxes . . . upon benefits due a participant or beneficiary under the Plan is pre-empted under ERISA section 514 [29 U.S.C. § 1144]."[2] The Tax Board thereupon brought suit against the plan and its trustees in Superior Court of the State of California (Los Angeles) seeking damages in the amount of its levies against the trust, plus interest, as well as a declaratory judgment that "defendants [are] legally obligated to honor all future levies by the Board upon defendant Trust Fund in collection of tax delinquencies of the beneficiaries of defendant Trust Fund. . ."[3]

The defendants removed the action to the United States District Court for the Central District of California. The

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[1] California Revenue and Taxation Code, § 18817.

[2] The full text of the Department of Labor's advisory opinion is set forth at pp. 25-27 of Appendix A (Exhibit H) of Motion Of Appellees To Dismiss Appeal Or In The Alternative To Affirm The Decision Below, filed in this Court on November 18, 1982 (hereinafter "Appellees' Motion of 11/18/82").

[3] Appellees' Motion of 11/18/82, Appendix A.

district court denied the Tax Board's motion to remand the case back to the state court, but granted summary judgment in favor of the Board on the merits. The district court held that ERISA does not preempt the Board from levying on the vacation trust fund benefits at issue.[4]

A panel of the U.S. Court of Appeals for the Ninth Circuit, with one judge dissenting, reversed the district court on the preemption issue in a decision officially reported at 679 F.2d 1307. The majority observed that "the state has not identified a legal basis to warrant a retreat from preemption"and "Congress has not left us at liberty to construe preemption as the state would have us construe it." 679 F.2d at 1309. The majority referred only briefly to the propriety of the removal of the action from state to federal court, noting that "[t]he trust has raised a federal question under ERISA" (679 F.2d at 1308, n.1); the dissenting judge, however, expressed "doubt that the district court possessed subject-matter jurisdiction over this action." 679 F.2d 1309.[5]

ERIC has a vital interest in ERISA's preemption provision because its members are large, multi-state employers, many of whom do business in all fifty states. They are therefore concerned that any erosion of that provision will subject their benefit plans to burdensome and costly state and local regulation and/or state and local judicial and administrative proceedings, will severely hamper

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[4] The judgment, findings of fact, and conclusions of law of the district court are not officially reported, but are set forth as Appendices B and C of Appellant's Jurisdictional Statement.

[5] Although the Tax Board complained in its Petition for Rehearing (Appellant's Jurisdictional Statement, Appendix E) that "the majority opinion has overlooked the issue of whether the federal court has jurisdiction of this matter," the Board conceded that "[t]he issue was not previously raised in this appeal . . ." The Petition for Rehearing was denied by the Court of Appeals in a brief order without opinion. (Appellant's Jurisdictional Statement, Appendix D).

their efforts to maintain uniform and equitable benefits for their workforces, and will infringe on their ability to engage in free collective bargaining on benefits with unions representing their employees. ERIC thus filed a brief *amicus curiae* in *Buczynski v. General Motors*, 451 U.S. 504 (1981), a companion case to and decided by the same opinion as *Alessi v. Raybestos-Manhattan, Inc.*, in which it supported the position, ultimately sustained by this Court, that a New Jersey statute which prohibited pension plans from reducing retirement benefits by amounts equal to state workers' compensation awards was preempted by ERISA. More recently, ERIC filed a brief *amicus curiae* in *Kramarsky v. Delta Air Lines*, No. 81-1578, argued on January 10, 1983 and awaiting decision. In that case, ERIC urged this Court to sustain the Second Circuit's decision[6] that ERISA preempts a New York civil rights statute which has been construed by the New York courts to require that employee benefit plans provide coverage for disability due to pregnancy on the same basis on which other disabling conditions are covered. ERIC has likewise appeared as *amicus* in cases before the courts of appeals involving the preemptive scope of ERISA. *E.g.*, *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981); *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

The instant case offers another variant in the pattern of cases in which the broad preemptive language of § 514(a) of ERISA is challenged. But here there is a threshold issue of jurisdiction as well. That issue is important to ERIC members because ready access to the federal courts is necessary to ensure that ERISA § 514(a) is given the full meaning and effect intended by Congress. If ERISA preemption questions cannot be removed from state to federal courts, authoritative resolution of those

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[6] *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287 (2nd Cir. 1981), *opinion on rehearing*, 666 F.2d 21 (1981).

questions is postponed or even avoided, and plan sponsors, administrators and trustees are uncertain of their obligations. Indeed, they may be faced with conflicting obligations, as, for example, might well have occurred in this case if the trustees had been ordered by a state court to take an action—transmitting funds in their custody to the Tax Board pursuant to the Board's garnishment notices—which the U.S. Department of Labor had advised was barred by ERISA and which could subject the trustees to personal liability.

With respect to the merits of the preemption issue in this case, like other such cases arising under ERISA the state can advance strong policy arguments for doing what it seeks to do. And, as in other cases, the assertion may be made that the particular state action will result in mere inconvenience and minor expense to plans and their administrators and trustees. ERIC, however, urges that these arguments and assertions are beside the point. We submit that Congress rejected an approach which makes preemption of any particular state action depend on whether, on balance, the state's interest outweighs the burdens such action would place on benefit plans. Instead, Congress opted for a definitive and all encompassing rule favoring federal preemption. And it did so because of the inherent unpredictability of the case-by-case balancing approach and, even more important, because a potentially infinite variety of state actions, each of which can be justified on policy grounds and none of which is by itself excessively burdensome, can have an onerous cumulative impact which impedes the development of a sound private benefit plan system which Congress sought to foster.

Accordingly, the position of ERIC is that the decision of the court of appeals is correct and should be affirmed by this Court.

SUMMARY OF ARGUMENT

Pursuant to 28 U.S.C. § 1441(b), an action may be removed from state to federal court if it arises under the Constitution or the laws of the United States. Where, as in this case, it is obvious from the face of the complaint that the issue of whether ERISA preempts state action is basic to the dispute between the parties, the action should be regarded as arising under the Constitution and laws of the United States for purposes of removal. Because preemption is central to the administration and operation of ERISA, a contrary view would frustrate the intent of Congress in enacting the preemption provision and could cause serious practical problems for plan administrators and trustees.

Section 514 of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" within ERISA's coverage. The term "State laws" is defined to include "all . . . State action having the effect of law" and encompasses action which impacts indirectly as well as directly on the terms and conditions of employee benefit plans. A notice of levy issued by a state agency pursuant to state law which compels the trustees of an employee benefit plan to turn plan assets over to the state constitutes state action which "relate[s] to" an ERISA-regulated plan where, as in this case, it compels the trustees to act in disregard not only of anti-alienation provisions in the plan itself, but also of ERISA's statutory prohibitions regarding the use of plan assets and the obligations of plan trustees. Hence, the notice of levy is preempted by ERISA. The state action in question here does not fall within any of the statutory exceptions to ERISA's preemption requirement. Moreover, both the statutory language and the legislative history, which indicates that the scope of preemption is as sweeping as it appears to be, preclude carving out any implied exception from what is an absolute prohibition.

ARGUMENT

I. REMOVAL OF THE FRANCHISE TAX BOARD'S CIVIL ACTION TO FEDERAL DISTRICT COURT WAS PROPER UNDER 28 U.S.C. § 1441(b)

From the outset of this litigation, the only dispute between the parties has been over the interpretation of a federal statute, specifically whether § 514(a) of ERISA preempts the Tax Board's attempt to levy under state law on the trust fund of an employee benefit plan for unpaid taxes of participants in the plan. The complaint filed by the Tax Board in state court framed the issue quite forthrightly. It alleged that the trustees refused to honor the Board's notices of levy, initially because the trustees were awaiting advice from the U.S. Department of Labor's Administrator of Pension and Welfare Benefit Programs as to whether they could do so consistent with ERISA, and subsequently because they had received the Administrator's opinion that they could not do so.[7] The Board even attached to its complaint the Administrator's opinion letter. Accordingly, as the Board stated in the Second Cause of Action of its complaint in which it sought declaratory judgment:

> There was at the time of the levies alleged above and continues to be an actual controversy between the parties concerning their respective legal rights and duties. The Board contends that defendants are obligated and required by law to pay over to the Board all amounts held in the Construction Laborers Vacation Trust for Southern California in favor of the Board's delinquent taxpayers. On the other hand, defendants contend that Section 514 of ERISA preempts state law and that the trustees lack the power to honor the levies made upon them by the State of California.
>
> . . . Accordingly, a declaration by this court of the parties' respective rights is required to fully and finally resolve this controversy.

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[7] Appellees' Motion of 11/18/82, Appendix A.

Section 1441(b) of title 28, U.S.C., provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." It is well settled, as the statutory language indicates, that, except for special situations not pertinent here, the general removal provision, § 1441, is keyed to original jurisdiction. 1A *Moore's Federal Practice*, ¶ 0.157[5], p. 100 (2d ed. 1982). The relevant jurisdictional statute here is 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Although the courts have endeavored to set forth a workable standard by which these jurisdictional statutes can be applied, success in this regard has proven elusive. As one commentator put it:

> The most difficult single problem in determining whether federal question jurisdiction exists is deciding when the relation of federal law to a case is such that the action may be said to be one "arising under" that law. [Footnotes omitted].
>
> There is no single rationalizing principle that will explain all of the decisions on this point. [Footnotes omitted].
>
> [C. Wright, A. Miller & E. Cooper. 13 *Federal Practice And Procedure*, cumm. supp. § 3562, p. 339 (1980)]

Accord: *e.g.*, *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843, 849 (8th Cir. 1980); *Town of Greenhorn v. Baker County, Oregon*, 596 F.2d 349, 351 (9th Cir. 1979).

To be sure, certain general principles have been formulated. This Court has said, for instance,

> . . . that, in order for a claim to arise "under the Constitution, laws, or treaties of the United States," "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank*, 299 US 109, 112, 81 L Ed 70, 57 S Ct 96 (1936). The federal questions "must be disclosed upon the face of the complaint, unaided by the answer." Moreover, "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Gully, supra*, at 113, 81 L Ed 70. *See also, Metcalf v. Watertown*, 128 US 586, 32 L Ed 543, 9 S Ct 173 (1888); *Tennessee v. Union & Planters' Bank*, 152 US 454, 38 L Ed 511, 14 S Ct 654 (1894); *Louisville & Nashville R. Co. v. Mottley*, 211 US 149, 53 L Ed 126, 29 S Ct 42 (1908); *Taylor v. Anderson*, 234 US 74, 58 L Ed 1218, 34 S Ct 724 (1914); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 US 667, 94 L Ed 1194, 70 S Ct 876 (1950).
>
> [*Phillips Petroleum Co. v. Texaco*, 415 U.S. 125, 127-128 (1974)]

On the other hand, the Court has also recognized the need to eschew mechanical application of the foregoing principles. As Justice Cardozo stated in his oft-cited opinion for the Court in *Gully v. First National Bank*, 299 U.S. 109, 117-118 (1936):

> This Court has had occasion to point out how futile is the attempt to define a "cause of action" without reference to the context. *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67, 68, 77 L.ed. 619, 622, 623, 53 S. Ct. 278. To define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end.

> *Bird v. St. Paul F. & M. Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86, 13 A.L.R. 875; *Leyland Shipping Co. v. Norwich Union F. Ins. Soc.* [1918] A.C. 350, 369-H.L.; *Aetna F. Ins. Co. v. Boon*, 95 U.S. 117, 130, 24 L.ed. 395, 398; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U.S. 469, 474, 24 L.ed. 256, 258. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

For purposes of determining removal jurisdiction under § 1441, claims of federal preemption present a particularly nettlesome problem. At least two members of this Court had occasion only recently to note that the problem was unresolved. Thus, during this very term, Justices White and Marshall dissented from the denial of certiorari in *Kerr-McGee Chemical Corp. v. Illinois*, 51 U.S.L.W. 3417 (No. 82-386, Nov. 30, 1982), on the ground that the "issue whether, or under what circumstances, a defendant's federal preemption claim presents a federal question sufficient to support removal of a state plaintiff's complaint which on its face raises only state claims, is a substantial one going to the heart of the power of federal courts to determine claims raised in state court proceedings." As the Eighth Circuit pointed out in its *en banc* opinion in *First National Bank of Aberdeen v. Aberdeen National Bank*, *supra*, 627 F.2d at 850-851, and cases cited therein, many courts have agreed "that a defense of preemption differs from other state law defenses in that preemption completely elimi-

nates the legal foundation of plaintiff's claim, whereas other defenses merely contest the applicability of the state law to the given fact situation." Those courts are of the view that "the removal court must look beyond plaintiff's complaint in order to ascertain what law the action really arises under, and for that purpose must determine the validity of defendant's assertion of preemption." On the other hand, other courts, including the Eighth Circuit in *Aberdeen*, have insisted on strict adherence to the general rules for determining whether an action arises under federal law, and hold that an assertion of preemption is a defense to a state claim and not a ground for federal jurisdiction.

Whatever the merits of the differing approaches taken by the courts with respect to claims of preemption involving other federal statutes, claims of preemption under ERISA warrant special consideration. Such claims often typify the "kaleidoscopic situation" referred to by Justice Cardozo in *Gully, supra*, to which a "common-sense accommodation of judgment" is required. In terms of the "compass" offered by *Gully*—which distinguishes "between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible"—claims of preemption under ERISA tend to be both "basic" and "necessary." In the case at bar, for instance, as shown above the claim of federal preemption is the only substantive dispute in the case and thus obviously "basic" and "necessary"—so much so that the Plaintiff Tax Board set forth the preemption issue in its complaint, asked for declaratory judgment with respect thereto, and in its current brief to this Court urges the Court "to hear and decide this appeal" notwithstanding its contention that "the District Court did not have jurisdiction over this case." (Tax Board's brief, p. 16).

Moreover, the preemption provision of ERISA is an important part of the structural framework of that statute. Accordingly, not to allow removal to federal court

of "basic" and "necessary" issues of preemption arising under ERISA is inconsistent with the legislative objectives. In a very real sense, the same legislative history which is relevant to the merits of the preemption issue in this case likewise has a bearing on the jurisdictional issue. Accordingly, although we cite that legislative history in more detail at pp. 18-21, *infra*, an abbreviated reference to it here is warranted.

The enactment of ERISA marked "the emergence of a comprehensive and pervasive Federal interest" in private employee benefit programs which "require[s] . . . the displacement of State action. . ." ERISA Leg. Hist., Vol. III at 4770-4771 (Remarks of Senator Javits).[8] Senator Javits added that Congress intended "that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Ibid.* It was further intended that preemption of federal law in this area should "apply in its broadest sense to all actions of State or local governments. . ." ERISA Leg. Hist., Vol. III at 4745-46 (Remarks of Senator Williams). Indeed, the "reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans" was described as "the crowning achievement" of ERISA. ERISA Leg. Hist., Vol. III at 4670-71 (Remarks of Congressman Dent). Because of the importance which Congress attached to preemption in enacting ERISA, and also because ERISA is a "comprehensive and reticulated statute" adopted by Congress after careful study,[9] it is virtually inconceivable that Congress meant that plaintiffs

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[8] Citations to "ERISA Leg. Hist." refer to the separately bound legislative history: Senate Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2nd Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes) (1976).

[9] *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

should be entitled to have preemption questions involving ERISA § 514 litigated in state courts without giving defendants the option to remove those questions to the federal courts under 28 U.S.C. § 1441(b). Rather, the conclusion is compelling that ERISA creates specific and uniquely federal rights, and that Congress expressed a strong preference that controversies regarding those rights be adjudicated in a federal tribunal, thereby eliminating the threat of conflicting and inconsistent state and local regulation.[10]

In other situations in which it has been found that Congress "has created a broad, comprehensive scheme" covering a particular area and has thus "occupied the field to the exclusion of state law," removal jurisdiction has been sustained on the ground that the complaint, even though it may not allege a federal claim *in haec verba*, does so *de facto*. *E.g.*, *North American Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233-234 (2nd Cir. 1978) (broad federal statutory scheme covering interstate shipment of freight). Significantly, in an area of labor law where this Court has recognized an overwhelming federal interest but not an exclusion of state law, removal has been sanctioned. Thus, in *Avco Corp. v. Aero Lodge, 735*, 390 U.S. 557 (1968), a state court action to enforce a "no strike" clause in a collective bargaining agreement was deemed to be a suit under § 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185, and, hence, removable to a federal court pursuant to 28 U.S.C. § 1441. However, in its subsequent decision in *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 243-245 (1970), the Court made clear, as it had concluded *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), "that the congressional purpose embodied in § 301(a) was to *supplement*, and not to encroach upon,

[10] *Cf.*, *Cartledge v. Miller*, 457 F. Supp. 1146, 1151-1153 (S.D.N.Y. 1978), *citing Mitchum v. Foster*, 407 U.S. 225, 237 (1972), *Marshall v. Chase Manhattan Bank N.A.*, 558 F.2d 680 (2nd Cir. 1977), and 120 Cong. Rec. 29197 (1974) (Cong. Dent).

the pre-existing jurisdiction of the state courts" over suits for violations of collective-bargaining agreements (ital. as in original). In light of *Boys Markets*, the only principled explanation for the removal jurisdiction approved in *Avco* is that any action to enforce the terms of a collective bargaining agreement, even one brought in state court alleging a claim under state law, is so likely to implicate in some way questions of federal labor law and the national labor policy that "removal is but one aspect of the primacy of the federal judiciary in deciding" those questions. (390 U.S. at 560, footnote omitted).

So with respect to ERISA, in which Congress has created a broad, comprehensive scheme in which preemption of state action plays a significant role, we submit that in order to preserve the primacy of the federal judiciary in deciding questions of federal law in a statutory area where there is an overwhelming federal interest, removal should be allowed when preemption questions are raised.

Finally, there are compelling practical considerations, which the facts of this case well illustrate, for permitting removal where "basic" and "necessary" preemption questions involving ERISA are raised. The trustees in this case were confronted with an advisory opinion from the Department of Labor, one of the federal agencies which is responsible for ensuring compliance with ERISA and issuing regulations and interpretations thereunder, that the state's attempt to levy on the trust was preempted by federal law. Moreover, the opinion reminded the trustees of the risks they ran as fiduciaries should they choose nonetheless to comply with the Tax Board's levy notices. In particular, the opinion pointed out that ERISA § 403(c)(1), 29 U.S.C. 1103(c)(1), requires that "the assets of a plan . . . shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable

expenses of administering the plan." The opinion also cited ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), which requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan. . ." With regard to the latter, the opinion quoted the trust instrument which mandated that "the money in each vacation account be received by the employee entitled thereto personally" and prohibited any "encumbrance or charge by any employee or other persons" on funds in participants' vacation accounts.

It is well settled that plan fiduciaries under ERISA who breach any of the responsibilities, obligations, or duties imposed upon them by that statute are personally liable for the losses such breach may cause. Indeed, ERISA § 409(a), 29 U.S.C. § 1109(a), so provides.

If the trustees in this case were precluded from removing the Board's action to federal district court and the state court then decided the preemption issue in favor of the Board, could the trustees rely on the state court's determination? Would they have a greater duty to appeal such an adverse determination even to the point of seeking certiorari from this Court than if the matter had been decided by a federal court? If the trustees paid over funds in participants' accounts pursuant to the state court's determination and the participants then sued the trustees for breach of their fiduciary duty under § 502 of ERISA in federal district court, would the court relieve the trustees of personal liability even if it differed with the state court's conclusion on the preemption issue? In short, can the trustees—faced with conflicting advice from the Department of Labor and at risk as fiduciaries under ERISA—be confident of immunity if they comply with a state court ruling? And if they do not comply, do they face penalties from the state court for such noncompliance?

Surely to force upon plan trustees and administrators this "damned if you do, damned if you don't" approach does not further the policies of ERISA. *See N.L.R.B. v. Dorn's Transportation Company*, 405 F.2d 706, 715 (2nd Cir. 1968). Rather, the better policy choice is to avoid these difficulties by allowing removal of actions brought in state court so that issues of overriding federal concern—the scope of ERISA's preemption provision—can be resolved in federal court.[11]

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[11] In *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 326-328 (2nd Cir. 1982), the plaintiff brought an action in federal district court seeking a declaratory judgment that a Connecticut statute requiring employers to provide health and life insurance in certain circumstances was preempted by ERISA. The defendant argued that the district court was without jurisdiction to hear the case because neither ERISA itself nor the Declaratory Judgment Act, 28 U.S.C. § 2201, provided the necessary jurisdictional basis. The plaintiff countered that, "even in a case where the preemptive federal law provides it with no right to relief, the doctrine of preemption nevertheless provides 'arising under' jurisdiction" pursuant to 28 U.S.C. § 1331. Both the district court and the court of appeals agreed with the plaintiff. The court of appeals concluded, *inter alia*, that "a cause of action invokes federal jurisdiction . . . where it presents a claim requiring construction of the Act [ERISA]" and that "a declaratory plaintiff can come into federal court asserting that preemption affords it insulation from a state-based claim." 690 F.2d at 328. The court also pointed out that "pragmatic considerations make it eminently logical and sensible that the forum for such a dispute be the federal district court."

Aside from the fact that in *Stone & Webster* it was the plaintiff which brought the action in federal court seeking to sustain a claim of preemption whereas in the instant case it is the plaintiff which brought an action in state court seeking to avoid a claim of preemption, the jurisdictional issues in the two cases are quite parallel. For essentially the same reasons as advanced by the court of appeals in that case, it is as logical and sensible in the instant case as it was in *Stone & Webster* for the forum for resolving the dispute over ERISA preemption to be the federal district court. We suggest that precluding federal court determination of "basic" and "necessary" ERISA preemption questions merely because the action was brought initially in state court would serve no useful purpose but rather would encourage an unseemly "race to the courthouse."

II. THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT ERISA § 514(a) PREEMPTS CALIFORNIA'S STATUTORY AUTHORIZATION FOR THE FRANCHISE TAX BOARD TO LEVY AGAINST A VACATION TRUST TO SATISFY A BENEFICIARY'S DELINQUENT TAXES

ERISA § 514(a) provides quite simply and directly that the provisions of Title I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." which is covered by ERISA, as that coverage is set forth in § 4 of Title I. The words "any and all" mean exactly what they say: every state statute that fits the description of "relating to" an employee benefit plan is preempted. *National Carriers' Conference Committee v. Heffernan*, 454 F. Supp. 914, 915 (D. Conn. 1978). Moreover, Congress took care to make certain that the term "State laws" would be all-encompassing. In § 514(c)(1), it defined that term to include "all laws, decisions, rules, regulations or other State action having the effect of law, of any State." And in § 514(c)(2), Congress was equally careful to specify that "'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title."

There are certain limited categories of state laws that Congress excepted from the "any and all" preemption requirement of § 514(a). Thus, § 514(b)(4) preserves "any generally applicable criminal law of a State." And § 514(b)(2)(A) provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." However, lest the latter provide an unintended loophole for state regulatory authority, Congress added § 514(b)(2)(B) forbidding states from deeming ERISA-covered plans and trusts to be insurance companies, banks, trust companies, or investment companies.

It is well settled that where, as here, "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980). That intent, however, is not to be found in the legislative history of ERISA. Instead, that legislative history persuasively—indeed, unqualifiedly—shows that Congress knew exactly what it wanted to accomplish in § 514 and used unmistakably plain statutory language to achieve that objective.

Thus, the versions of ERISA which initially passed the House and Senate contained preemption provisions which were considerably more limited than the current § 514(a). The House bill provided that "part I of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part I applies." ERISA Leg. Hist., Vol. III at 3897, 4057-4058. The Senate bill provided that "the provisions of this Act or the Welfare and Pension Plans Disclosure Act shall supersede any and all laws of the States . . . insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act. . ." ERISA Leg. Hist., Vol. III at 3598, 3820. It is evident that the approach to preemption taken in these earlier versions of ERISA is quite different from the approach taken by the House and Senate Conference Committee, which rejected both the House and Senate bills and agreed on a substitute that was ultimately enacted into law. ERISA Leg. Hist., Vol. III at 4518. Whereas the earlier versions limited preemption to specific enumerated areas or "to the subject matters" regulated by federal law, the substitute preempted all state laws "as they may now or hereafter relate to any employee benefit plan" subject to certain enumerated excep-

tions. In short, "Congress made a clear-cut decision not to identify various subjects on which state laws were to be preempted, but instead sought to avoid constant litigation over the scope of preemption by preempting, with certain exceptions, 'all' state laws insofar as they 'relate' to plans covered by ERISA." *Pervel Industries, Inc. v. Connecticut Commission on Human Rights*, 468 F. Supp. 490, 492 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1031.

That this shift in approach adopted by the Conference Committee was indeed a clear-cut and well thought-out decision is seen from the explicit statements made by three members of Congress who were most intimately involved in the drafting and passage of ERISA. As Senator Jacob Javits, the ranking minority member of the Senate Committee on Labor and Public Welfare, explained (ERISA Leg. Hist., Vol. III at 4770-4771):

> Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill.
>
> Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. . . .
>
> . . . It is also intended that a body of Federal substantive law will be developed by the courts to deal

with issues involving rights and obligations under private welfare and pension plans.

Significantly, Senator Javits pointed out that the conferees fully recognized "the dimensions" of the policy embodied in the new preemption provision adopted by the Conference Committee. Nevertheless, they concluded, particularly in light of a study to be conducted by a Congressional Joint Pension Task Force, that "[i]f it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made." ERISA Leg. Hist., Vol. III at 4771.[19]

The remarks of Senator Harrison Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, were along the same lines as those of Senator Javits. In introducing the Conference Report on ERISA, Senator Williams "stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." ERISA Leg. Hist., Vol. III at 4745-46. Senator Williams emphasized that the "principle" embodied in the preemption provision of the substitute bill "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof. . ." *Ibid.*

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[19] The mechanism for continued Congressional oversight of the preemption provision, as well as other ERISA provisions, was actually written into the bill itself. Thus, ERISA § 3021 provides for the establishment of a Joint Pension Task Force, whose duties were to be carried out by the staffs of the Congressional committees having jurisdiction over pension and welfare benefits legislation. ERISA § 3022(a)(4) specifies that one of the duties of the Joint Pension Task Force is to "make a full study and review of . . . the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans."

Likewise, on the floor of the House of Representatives Congressman John Dent, Chairman of the Subcommittee on Labor of the House Education and Labor Committee, heralded the Conference Committee version of the preemption clause as a major accomplishment (ERISA Leg. Hist., Vol. III at 4670-71):

> Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation . . .
>
> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of Section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof . . . which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).

The formal Joint Explanatory Statement of the Conference Committee was more succinct, but nonetheless echoed the theme that "the provisions of Title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce." ERISA Leg. Hist., Vol. III at 4650. The Joint Explanatory Statement also noted that the substitute bill "provides that the congressional Pension Task Force is to study this provision and report back to the labor committees of the Congress on the results of its study." *Ibid.*

Although § 514(a) preempts state laws which "relate to" employee benefit plans, there is no precise statutory

definition of that term. However, as shown *supra*, p. 17, § 514(c)(2) defines a "State" to include any instrumentality or agency thereof "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans. . . ." And ERISA § 514(c)(1) defines "State law" to include "all laws, decisions, rules, regulations or other State action having the effect of law. . . ." Given this all encompassing language and in light of the legislative history cited above, the inference is compelling that Congress intended the phrase "relate to" to be interpreted in an equally broad, rather than a constricted, manner. *Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations of the State of Wisconsin*, 599 F.2d 205, 208-210 (1979), *cert. denied*, 444 U.S. 1031 (1980).

In light of the foregoing, it is plain that the notices of levy issued in the instant case pursuant to state statutes constitute "state action" which "relate[s] to" an ERISA-regulated employee benefit plan within the meaning of ERISA § 514. Nor is the relationship remote or peripheral. For we have here a state agency compelling the plan trustees to turn plan assets held in trust over to the state in violation of provisions in the plan document which require that the monies in each individual's vacation account be paid to that individual personally and which prohibit any alienation, encumbrance or charge against those funds. Simply put, the state in this case is seeking to compel the trustees to disregard their obligations under ERISA § 404(a)(1)(D) to discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV [of ERISA]." The trustees might also be violating other requirements of ERISA §§ 403 and 404 in that, by honoring the notices of levy in contravention of the terms of the plan itself, the trustees would not be administering the plan "solely in the interest of the participants and beneficiaries" and would, in fact, be diverting plan assets for purposes other than "the

exclusive purposes of providing benefits to participants in the plan and defraying reasonable expenses of administering the plan."

To be sure, the California statutes pursuant to which the notices of levy in this case were issued were probably not enacted for the purpose of regulating employee benefit plans. But, as this Court made clear in *Alessi v. Raybestos-Manhattan, Inc.*, *supra*, 451 U.S. at 524-525, that is beside the point:

> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern.

In *Alessi*, the state action found to encroach on an area of exclusive federal concern was a New Jersey statute which prohibited integration of workers' compensation and pension benefits even though such integration was permitted but not required by ERISA. So here we have state action which attempts to nullify a plan provision—in this case a bar against alienation or encumbrance of benefits—which is permitted but not required by ERISA. Although the plan provisions in the two cases are obviously different, we submit that the state action in the case at bar is analytically no different in "relat[ing] to" an employee benefit plan, and thus encroaching on an area of exclusive federal concern, than the state action found preempted in *Alessi*.

Once it is determined, as we urge it must be here, that a state is seeking to take action which directly or indirectly "relate[s] to" an employee benefit plan, that should normally end the matter: § 514(a) of ERISA mandates federal preemption unless the state action fits within the narrow statutory exceptions (none of which are relevant in the instant case). There is no room in the statutory language or legislative history for judicial balancing of

competing state and federal interests. Congress foreclosed that option in deciding that the preemption provision "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof." (*Supra*, p. 20). In extending federal preemption to its outer limits, Congress had perfectly rational and legitimate objectives: to eliminate the threat of conflicting and inconsistent state and local regulation, and, as important, to avoid the potential for "endless litigation" over the scope of federal preemption. As did this Court in *Alessi*, the decisions of the lower federal courts have delineated and sought to give full effect to the Congressional purpose in enacting § 514. *E.g., Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 328-330 (2nd Cir. 1982); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-1216 (8th Cir. 1981); *Std. Oil Co. of Cal. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980); *Pervel Industries v. Conn. Comm'n on Human Rights, supra*; *National Carriers Conference Committee v. Heffernan, supra.*

The Franchise Tax Board argues (Brief, pp. 26-29), however, that the case at bar is analogous to those cases in which the courts have allowed pension plan benefits to be subject to the payment of alimony and family support. *E.g., Operating Engineers Pension Trust Fund v. Zamborsky*, 650 F.2d 196 (9th Cir. 1981); *American Tel. & Tel. v. Merry*, 592 F.2d 118 (2nd Cir. 1980); *Cartledge v. Miller, supra.* Assuming without conceding that those cases are correct, they have been regarded as *sui generis*—a "judicial exception . . . carved out of . . . [a] seemingly absolute prohibition" and "premised upon the statute's broad purpose to provide protection for employees and their families . . ."—the rationale for which cannot serve as valid precedent in other ERISA preemption cases. *Tenneco Inc. v. First Virginia Bank of Tidewater*, 4th Cir., No. 82-1158, January 27, 1983, slip opinion pp. 5-6. Accord: *Stone & Webster Engineering Corp.*

v. Ilsley, supra, 690 F.2d at 329; *General Motors Corp. v. Buha*, 623 F.2d 455, 460-461 (6th Cir. 1980).[13]

The Franchise Tax Board further argues (Brief, pp. 32-33) for the creation of an implied exception to ERISA's broad preemption provision to cover its claim in this case based on "the different status of pension and welfare plans." The Board emphasizes that § 206(d) of ERISA requires only pension plans but not welfare plans to contain a provision that benefits provided under the plan may not be assigned or alienated. However, it does not follow, as the Board would have it, that therefore Congress did not intend ERISA's preemption provision to cover state action to levy on welfare plan assets. The Board cites nothing in the legislative history of ERISA, and we are not aware of anything, that would support the conclusion that § 206(d) by negative implication was intended to permit a state or any other creditor to levy on the assets of a welfare plan notwithstanding prohibitions against alienation contained in the plan document.

On the contrary, it is readily apparent that the same concerns which caused Congress to require an anti-alienation provision to protect pension benefits are present with respect to welfare benefits. For example, it would be incongruous to bar garnishment of pension benefits by creditors, either private or state and local

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[13] Significantly, the Department of Labor, which is charged with enforcement and interpretation of ERISA, likewise regards state action to enforce family support obligations as presenting a unique situation for purposes of ERISA preemption. Thus, in *Cartledge v. Miller, supra*, the Department took the position in an *amicus* brief that a state court support decree was not preempted. In the quite different circumstances presented by the instant case, the Department concluded in an advisory opinion that the state's attempt to levy on the assets of the vacation trust is preempted. (*Supra*, p. 2). As the court in *Cartledge* observed, the Labor Department's "interpretation of the Act, though not controlling, is entitled to great weight." 457 F. Supp. at 1156, citing, *inter alia, United States v. Penn. Chem. Corp.*, 411 U.S. 655, 674 (1973).

government, but yet permit such garnishment of disability benefits paid by a welfare plan which by its terms prohibits alienation or encumbrance of benefits. Surely, disability benefits must be deemed as important to plan participants as pension benefits, if not more so, and at least as deserving of ERISA's protection. Of course, if the Franchise Tax Board's effort to levy against a vacation trust which contains an anti-alienation provision is not preempted by ERISA, consistency would mandate that a similar attempt to levy against a trust paying disability benefits would also not be preempted by ERISA—a result not likely intended by Congress.

However, there was good reason for Congress not to require all welfare plans to have an anti-alienation provision, as ERISA § 206(d) requires of pension plans, but rather to leave the inclusion of such a provision as a matter to be determined by the plan draftsmen in light of the purposes of the plan. For instance, it is common for participants in health insurance plans to assign the benefits they are entitled to thereunder to hospitals and doctors so that these providers of medical care can receive payment directly from the plan for services rendered. A statutory anti-alienation provision applicable to all welfare plans might well preclude such widely utilized arrangements.

In short, just because Congress made anti-alienation provisions permissive rather than mandatory with respect to welfare plans does not mean that they can be overridden by state action any more than the permissive integration provisions which were the subject of the *Alessi* decision can be so overridden. Accordingly, where, as here, a welfare plan does incorporate an anti-alienation provision which is permissible under ERISA and which surely serves legitimate ends from the standpoint of plan participants, ERISA's preemption clause requires that the anti-alienation provision be given full effect as against state action seeking to undermine it.

CONCLUSION

For all of the foregoing reasons, ERIC, as *amicus curiae*, urges that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,



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